

COMMENTARIES  
ON THE  
L A W S  
OF  
E N G L A N D.  
BOOK THE THIRD.

BY  
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COURT OF COMMON PLEAS.

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THE TENTH EDITION, .  
WITH THE LAST CORRECTIONS OF THE AUTHOR;  
*ADDITIONS BY RICHARD BURN, LL.D.*  
AND CONTINUED TO THE PRESENT TIME,  
BY JOHN WILLIAMS, ESQ.

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## CHAPTER THE TWELFTH.

## OF TRESPASS.

**I**N the two preceding chapters we have considered such injuries to real property, as consisted in an ouster, or amotion of the possession. Those which remain to be discussed are such as may be offered to a man's real property without any amotion from it.

THE second species therefore of real injuries, or wrongs that affect a man's lands, tenements, or hereditaments, is that of *trespass*. *Trespass*, in it's largest, and most extensive sense, signifies any transgression or offence against the law of nature, of society, or of the country in which we live; whether it relates to a man's person, or his property. Therefore beating another is a *trespass*; for which (as we have formerly seen) an action of *trespass vi et armis* in assault and battery will lie; taking or detaining a man's goods are respectively *trespasses*; for which an action of *trespass vi et armis*, or on the case in *trover* and *conversion*, is given by the law: so also non-performance of promises or undertakings is a *trespass*, upon which an action of *trespass* on the case in *assumpsit* is grounded: and, in general, any misfeasance, or act of one man whereby another is injuriously treated or damnified, is a transgression, or *trespass* in it's largest sense; for which we have already seen<sup>a</sup> that, whenever the act itself is directly and immediately injurious to the person or property of another,

<sup>a</sup> See pag. 123.

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and therefore necessarily accompanied with some force, an action of trespass *vi et armis* will lie ; but, if the injury is only consequential, a special action of trespass *on the case* may be brought.

BUT in the limited and confined sense, in which we are at present to consider it, it signifies no more than an entry on another man's ground without a lawful authority, and doing some damage, however inconsiderable, to his real property. For the right of *meum* and *tuum*, or property, in lands being once established, it follows as a necessary consequence, that this right must be exclusive ; that is, that the owner may retain to himself the sole use and occupation of his soil : every entry therefore thereon without the owner's leave, and especially if contrary to his express order, is a trespass or transgression. The Roman laws seem to have made a direct prohibition necessary, in order to constitute this injury : "*qui alienum fundum ingreditur, potest a domino, si is praeviderit, prohiberi ne ingrediatur*"<sup>b</sup>. But the law of England, justly considering that much inconvenience may happen to the owner, before he has an opportunity to forbid the entry, has carried the point much farther, and has treated every entry upon another's lands, (unless by the owner's leave, or in some very particular cases) as an injury or wrong, for satisfaction of which an action of trespass will lie ; but determines the *quantum* of that satisfaction, by considering how far the offence was wilful or inadvertent, and by estimating the value of the actual damage sustained.

EVERY unwarrantable entry on another's soil the law entitles a trespass by *breaking his close* ; the words of the writ of trespass commanding the defendant to shew cause, *quare clausum querentis fregit*. For every man's land is in the eye of the law inclosed and set apart from his neighbours : and that either by a visible and material fence, as one field is divided from another by a hedge ; or, by an ideal invisible boundary,

<sup>b</sup> *Inst.* 2. 1. 12.

existing only in the contemplation of law, as when one man's land adjoins to another's in the same field. And every such entry or breach of a man's close carries necessarily along with it some damage or other: for, if no other special loss can be assigned, yet still the words of the writ itself specify one general damage, *viz.* the treading down and bruising his herbage<sup>c</sup>.

ONE must have a property (either absolute or temporary) in the soil, and actual possession by entry, to be able to maintain an action of trespass: or at least, it is requisite that the party have a lease and possession of the vesture and herbage of the land<sup>d</sup>. Thus if a meadow be divided annually among the parishioners by lot, then, after each person's several portion is allotted, they may be respectively capable of maintaining an action for the breach of their several closes<sup>e</sup>: for they have an exclusive interest and freehold therein for the time. But before entry and actual possession, one cannot maintain an action of trespass, though he hath the freehold in law<sup>f</sup>. And therefore an heir before entry cannot have this action against an abator; though a disseisee might have it against the disseisor, for the injury done by the disseisin itself, at which time the plaintiff was seised of the land: but he cannot have it for any act done after the disseisin, until he hath gained possession by re-entry, and then he may well maintain it for the intermediate damage done; for after his re-entry the law, by a kind of *jus postliminii*, supposes the freehold to have all along continued in him<sup>g</sup>. Neither, by the common law, in case of an intrusion or deforcement, could the party kept out of possession sue the wrongdoer by a mode of redress, which was calculated merely for injuries committed against the land while *in the possession* of the owner. But now by the statute 6 Ann. c. 18. if a guardian or trustee for any infant, a husband seised *jure uxoris*, or a person having any estate or interest determinable upon a life or lives, shall, after the deter-

<sup>c</sup> F. N. B. 87, 88.

<sup>f</sup> 2 Roll. Abr. 553.

<sup>d</sup> Dyer. 285. 2 Roll. Abr. 549.

<sup>g</sup> 11 Rep. 5.

<sup>e</sup> Cro. Eliz. 421.

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mination of their respective interests, hold over and continue in possession of the lands or tenements, without the consent of the person intitled thereto, they are adjudged to be trespassers; and any reversioner or remainder-man, expectant on any life-estate, may once in every year, by motion to the court of chancery, procure the *cessuy que vie* to be produced by the tenant of the land, or may enter thereon in case of his refusal or wilful neglect. And, by the statutes of 4 Geo. II. c. 28. and 11 Geo. II. c. 19. in case after the determination of any term of life, lives, or years, any person shall wilfully hold over the same, the lessor or reversioner is entitled to recover by action of debt, either at the rate of double the annual value of the premises, in case he himself hath demanded and given notice in writing to the tenant to deliver the possession; or else double the usual rent, in case the notice of quitting proceeds from the tenant himself, having power to determine his lease, and he afterwards neglects to carry that notice into due execution.

A MAN is answerable for not only his own trespass, but that of his cattle also: for, if by his negligent keeping they stray upon the land of another (and much more if he permits, or drives them on) and they there tread down his neighbour's herbage, and spoil his corn or his trees, this is a trespass for which the owner must answer in damages. And the law gives the party injured a double remedy in this case; by permitting him to distrein the cattle thus *damage-feasant*, or doing damage, till the owner shall make him satisfaction; or else by leaving him to the common remedy *in foro contentioso*, by action. And the action that lies in either of these cases, of trespass committed upon another's land either by a man himself or his cattle, is the action of trespass *vi et armis*; whereby a man is called upon to answer, *quare vi et armis clausum ipsius A. apud B. fregit, et blada ipsius A. ad valentiam centum solidorum ibidem nuper crescentia cum quibusdam averiis depastus fuit, conculcavit, et consumpsit, &c.*<sup>b</sup>: for the law always couples the idea of force with that of intrusion upon the property of another. And herein, if any unwarrantable act of the

<sup>b</sup> *Registr.* 94.

defendant or his beasts in coming upon the land be proved, it is an act of trespass for which the plaintiff must recover some damages; such however as the jury shall think proper to assess.

IN trespasses of a permanent nature, where the injury is continually renewed, (as by spoiling or consuming the herbage with the defendant's cattle) the declaration may allege the injury to have been committed by *continuation* from one given day to another; (which is called laying the action with a *continuando*) and the plaintiff shall not be compelled to bring separate actions for every day's separate offence<sup>1</sup>. But where the trespass is by one or several acts, each of which terminates in itself, and being once done cannot be done again, it cannot be laid with a *continuando*; yet if there be repeated acts of trespass committed, (as cutting down a certain number of trees,) they may be laid to be done, not continually, but at divers days and times within a given period<sup>2</sup>.

IN some cases trespass is justifiable; or, rather, entry on another's land or house shall not in those cases be accounted trespass: as if a man comes thither to demand or pay money, there payable: or to execute, in a legal manner, the process of the law. Also a man may justify entering into an inn or public house, without the leave of the owner first specially asked; because when a man professes the keeping of such inn or public house, he thereby gives a general licence to any person to enter his doors. So a landlord may justify entering to distrein for rent; a commoner to attend his cattle, commoning on another's land; and a reversioner, to see if any waste be committed on the estate; for the apparent necessity of the thing<sup>1</sup>. Also it hath been said, that by the common law and custom of England the poor are allowed to enter and glean upon another's ground after the harvest, without

<sup>1</sup> 2 Roll. Abr. 545. Lord Raym. 240. 7 Mod. 152.

<sup>2</sup> Salk. 638, 639. Lord Raym. 823. 1 S Rep. 146.

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being guilty of trespass<sup>m</sup> : which humane provision seems borrowed from the mosaical law<sup>n</sup>. In like manner the common law warrants the hunting of ravenous beasts of prey, as badgers and foxes, in another man's land ; because the destroying such creatures is said to be profitable to the public<sup>o</sup>. But in cases where a man misdemeanors himself, or makes an ill use of the authority with which the law entrusts him, he shall be accounted a trespasser *ab initio*<sup>p</sup> : as if one comes into a tavern and will not go out in a reasonable time, but carries there all night contrary to the inclinations of the owner ; this wrongful act shall effect and have relation back even to his first entry, and make the whole a trespass<sup>q</sup>. But a bare non-feasance, as not paying for the wine he calls for, will not make him a trespasser ; for this is only a breach of contract, for which the taverner shall have an action of debt or *assumpsit* against him<sup>r</sup>. So if a landlord distrained for rent, and wilfully killed the distress, this by the common law made him a trespasser *ab initio*<sup>s</sup> : and so indeed would any other irregularity have done, till the statute 11 Geo. II. c. 19. which enacts, that no subsequent irregularity of the landlord shall make his first entry a trespass ; but the party injured shall have a special action of trespass or on the case, for the real specific injury sustained, unless tender of amends hath been made. But still, if a reversioner, who enters on pretence of seeing waste, breaks the house, or stays there all night ; or if the commoner who comes to tend his cattle, cuts down a tree ; in these and similar cases the law judges that he entered for this unlawful purpose, and therefore, as the act which demonstrates such his purpose is a trespass, he shall be esteemed a trespasser *ab initio*<sup>t</sup>. So also in the case of hunting the fox or the badger, a man cannot justify breaking the soil, and digging him out of his earth : for though

<sup>m</sup> Gilb. Ev. 253. Trials *per pais*.  
ch. 15. pa. 438.

<sup>n</sup> Levit. c. 19. v. 9. & c. 23. v. 22.  
Deut. c. 24. v. 19, &c.

<sup>o</sup> Cro. Jac. 321.

<sup>p</sup> Finch. L. 47. Cro. Jac. 148.

<sup>q</sup> 2 Roll. Abr. 561.

<sup>r</sup> 8 Rep. 147.

<sup>s</sup> Finch. L. 47.

<sup>t</sup> 8 Rep. 146.

the law warrants the hunting of such noxious animals for the public good, yet it is held " that such things must be done in an ordinary and usual manner ; therefore, as there is an ordinary course to kill them, viz. by hunting, the court held that the digging for them was unlawful.

A MAN may also justify in an action of trespass, on account of the freehold and right of entry being in himself ; and this defence brings the title of the estate in question. This is therefore one of the ways devised, since the disuse of real actions, to try the property of estates ; though it is not so usual as that by ejectment, because that, being now a mixed action, not only gives damages for the ejectment, but also possession of the land : whereas in trespass, which is merely a personal suit, the right can be only ascertained, but no possession delivered ; nothing being recovered but damages for the wrong committed.

IN order to prevent trifling and vexatious actions of trespass, as well as other personal actions, it is (*inter alia*) enacted by statutes 43 Eliz. c. 6. and 22 & 23 Car. II. c. 9. §. 136. that where the jury, who try an action of trespass, give less damages than forty shillings, the plaintiff shall be allowed no more costs than damages ; unless the judge shall certify under his hand that the freehold or title of the land came chiefly in question. But this rule now admits of two exceptions more, which have been made by subsequent statutes. One is by statute 8 & 9 W. III. c. 11. which enacts, that in all actions of trespass, wherein it shall appear that the trespass was wilful and malicious, and it be so certified by the judge, the plaintiff shall recover full costs. Every trespass is *wilful*, where the defendant has notice, and is especially forewarned not to come on the land ; as every trespass is *malicious*, though the damage may not amount to forty shillings, where the intent of the defendant plainly appears to

<sup>u</sup> Cro. Jac. 321.



be to harass and distress the plaintiff. The other exception is by statute 4 and 5 W. & M. c. 23. which gives full costs against any inferior tradesman, apprentice, or other dissolute person, who is convicted of a trespass in hawking, hunting, fishing, or fowling upon another's land. Upon this statute it has been adjudged, that if a person be an inferior tradesman, as a clothier for instance, it matters not what qualification he may have in point of estate; but, if he be guilty of such trespass, he shall be liable to pay full costs<sup>w</sup>.

<sup>w</sup> Lord Raym. 149.